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IN THE

Supreme Court of the United States

October Term, 1941

No. 657

JOHN C. GEIGER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

RAY L. CHESEBRO,
City Attorney,
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Deputy City Attorney,
City Hall, Los Angeles, California,
Counsel for Respondent.

Parker & Baird Company, Law Printers, Los Angeles.

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RESPONDENT'S BRIEF.

Foreword.

Copy of the record which was to be filed by the petitioner in the above entitled proceeding was served upon the respondent prior to the date of filing it in this court. We have been served with no notice of such filing. On October 10th, 1941, we were served with notice of filing in Docket No. 683. Being informed at the time of signing the receipt for such notice that it was notice of filing application for certiorari from the judgment of the Appellate Department of the Superior Court in the appeal matter, we addressed a letter to the Clerk of this Court concerning the record in such matter. On October 22nd, 1941, we received his reply, which informed us that Docket No. 683 covered the application for certiorari upon the order of the Superior Court denying petitioner's

release upon habeas corpus and that the appeal matter was filed as Docket No. 657. That was the first information we had that both records had been filed. We asked the Clerk whether his record showed that we had been served with notice of filing papers in Docket No. 657, and he advised that the record had been filed on September 26th, 1941, and that our time in which to file a brief commenced running on that date. His reply, received October 27th, 1941, was the first notice we had of the date of filing papers in this Court. It was our understanding of the rule that our time in which to file a brief commenced to run from the date on which we received notice of the filing of the record. We shall refer to this matter in our arugment on objections to jurisdiction.

Statement of the Case.

This proceeding is an application for certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, hereafter called the Appellate Department, asking said court to review the action of such court in an appeal from the judgment of the Municipal Court of the City of Los Angeles.

The petitioner was charged in said complaint with the offense of vagrancy (violation of subdivision 5 of Section 647, Penal Code of the State of California). The complaint was filed April 15, 1941, and defendant was arraigned on that date, at which time trial was set for May 12, 1941. On May 12th he appeared in court without counsel and announced he was ready to proceed to trial without counsel, and waived trial by jury. The court, after such announcement and waiver, appointed the deputy

public defender to assist the petitioner. Trial then proceeded and the defendant was convicted, and, on May 19th, judgment of imprisonment was pronounced.

Petitioner had been released upon bail after his arrest and before arraignment, and remained at liberty on bail at all times from April 15th until after completion of the trial on May 12th. On May 19th notice of appeal from the judgment was filed. Such appeal was perfected and file was transmitted to the Appellate Department of the Superior Court.

The facts and dates stated above are shown upon the certified copy of the docket of the Municipal Court made a part of the record on appeal in the Appellate Department. Petitioner failed to include that portion of the record of the Appellate Department in his record. For the purpose of supporting our brief, and not for the purpose of curing petitioner's record, we transmit herewith a certified copy of such record, and also print the same in our brief as "Supplement A".

In our argument upon our objections to jurisdiction we shall discuss in more detail not only the failure of petitioner to include such part of the record in his papers but also the fact that several of the papers included by him in his record are not properly certified.

After the file was received in the Appellate Department the case was argued and submitted, and on June 19, 1941, the judgment of the Municipal Court was affirmed. (See copy of order affirming judgment in file.)

Summary of Argument.

I. Objection to jurisdiction upon the ground that the record submitted is not only incomplete but is not prepared in the manner provided by rules of this Court.

II. The petitioner has not been denied the right of counsel.

III. Subdivision 5 of Section 647 of the Penal Code of the State of California is not unconstitutional.

I.

Objection to Jurisdiction Upon the Ground That the Record Submitted Is Not Only Incomplete but Is Not Prepared in the Manner Provided by Rules of This Court.

The petitioner has failed to observe the rules of this Court in preparing his record. Examination of the papers attached to the petition in this case discloses that there is attached thereto

(1) a copy of a complaint filed in the Municipal Court of the City of Los Angeles;

(2) a copy of a motion for new trial filed in such court;

(3) a copy of an affidavit by John C. Geiger filed in such court, and

(4) a copy of the minutes of such court on May 19, 1941;

each of which is certified by the Clerk of the Municipal Court as being true copies of the papers on file in such court. Such certification does not in any wise show that such copies are copies of papers constituting the record on appeal in the Appellate Department.

Following the above named papers in the record submitted by the petitioner we find:

(a) copy of notice of appeal;

(b) copy of engrossed statement on appeal;

(c) copy of decision and order of the Appellate Department;

(d) copy of petition for rehearing, and

(e) copy of order denying petition for rehearing;

each of which is certified by the County Clerk to be true and correct copies of the papers named.

The last named papers are not certified to be, and do not purport to be the complete record on appeal in the Appellate Department in the matter of the appeal of John C. Geiger from the judgment of the Municipal Court of the City of Los Angeles. In truth and in fact they do not constitute the entire record.

Rule 3 of Judicial Council Rules, criminal appeals to superior courts from municipal courts, which designates the papers to be included in the record on appeal, is printed in the appendix hereto, page 9.

Examination of the record submitted by petitioner discloses that such record does not show the entry of jury waiver on the docket, as is required by Item 3 of the rule named, and does not show "all other minutes of the court relating to the action", as is required by Item 5 of such rule. The only purported minutes included in the record submitted by petitioner are for May 19th, and they do not purport to be a copy of part of the record sent to the Appellate Department.

Subdivision 1 of Rule 38 of this Court provides that petition for certiorari shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed.

This Court, upon granting a petition for certiorari to a state court, requires that the record of such court accompany the petition. This Court is to review the action of a certain state court. Whether such court erred must be determined from examination of the record of that court, and not from a record assembled by petitioner and consisting of papers secured by him from the records of various courts, some of which may or may not have been included in the files of the court whose decision is to be reviewed. (*Atherton v. Fowler,* 1 Otto 143, 91 U. S. 143.)

This Court should not take jurisdiction of the instant proceeding for a further reason. Petitioner has failed to comply with the provisions of subdivision 3 of Rule 38 which provides for service upon respondent of notice of filing of the petition ten days after the same has been filed. As pointed out heretofore, the petitioner has never served us with such notice. By reason of fortuitous circumstances we learned that the record had been filed in this Court.

One who fails to give proper notice of time of filing to enable his adversary to prepare his brief is not entitled to serious consideration by the court. The fact that we received notice of filing another proceeding growing out of the same circumstances and acts of this petitioner which resulted in our acquiring knowledge of the fact of filing in this case should not excuse petitioner.

II.

The Petitioner Has Not Been Denied the Right of Counsel.

In our brief filed in *Geiger v. The People of the State of California*, Docket No. 683, we discussed this point quite fully. We see no good reason for reprinting here the argument submitted in that case. We therefore respectfully incorporate herein by reference the argument included in the brief filed in Docket No. 683.

III.

Subdivision 5 of Section 647 of the Penal Code of the State of California Is Not Unconstitutional.

This point has likewise been fully covered in our brief filed in *Geiger v. The People of the State of California*, Docket No. 683, and for the reason stated above we refrain from repeating such argument here. By reference, we incorporate herein the argument submitted in Docket No. 683.

Conclusion.

Respondent urges that there has been such violation of Rule 38 of this Court that the petition should be denied upon that ground. If, however, it be felt by the Court that such disregard of rules does not justify summary action by the Court, we nevertheless insist that the record affirmatively shows that the petitioner has suffered no injury and that his petition is without merit.

The petition for certiorari should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
W. JOS. MCFARLAND,
JOHN L. BLAND,
Counsel for Respondent.

APPENDIX.

JUDICIAL COUNCIL RULES

CRIMINAL APPEALS TO THE SUPERIOR COURT FROM MUNICIPAL COURTS AND INFERIOR COURTS

"RULE 3. *Record on Appeal.* The record on an appeal to a superior court from an inferior court in a criminal case shall consist of the following items, or so many thereof as may exist in the particular case:

1. The complaint;

2. The plea or pleas of the defendant;

3. The verdict, or, if a jury was waived, the entry of such waiver in the minutes or docket and the finding of the court upon the issues;

4. Any written motion for new trial, in arrest of judgment or to dismiss or otherwise terminate the action, or the entry in the minutes or docket of any oral motion to the same effect, and the order of the court thereon;

5. All other minutes of the court relating to the action;

6. The judgment, and the order appealed from, if the appeal is from an order;

7. The notice of appeal;

8. If the appeal is from an order made after judgment, items 2, 3, 4 and 5 may be omitted, and the record

shall include any written motion and any written notices of motion, the denial or granting of which is the order appealed from, or the entry in the minutes or docket of any such oral motion, and all minutes of the court relating to such motion.

The foregoing, or such of them as may be pertinent to the appeal taken, shall be prepared by the clerk of the trial court or by the judge thereof, if there be no clerk;

9. In addition thereto, the statement or transcript on appeal, or both, settled and certified by the trial judge as hereinafter provided for in Rules 4 and 7.

As soon as the statement or transcript on appeal has been settled and certified, the clerk of the trial court or the judge thereof, if there be no clerk, shall forthwith transmit the record on appeal to the clerk of the superior court to which the appeal is taken, together with all exhibits or other documents properly referred to and identified in the statement or transcript."

"SUPPLEMENT A"

Municipal Court, City of Los Angeles
County of Los Angeles, State of California

People of the State of California, Plaintiff, vs. John C. Geiger, Defendant. No. 5132

Apr 14, 1941 $500– Surety Bond filed.

Apr 15, 1941 Complaint filed, sworn to by W. N. Brinkerhoff charging the Defendant with having on Apr 14, 1941 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: VAGRANCY LEWD

Apr 15, 1941 Cause called. Judge Johnson presiding. Both parties ready. People represented by W. Stevens (D. C. A.). Defendant represented by Donald C. Bodwell.

Defendant in court duly arraigned, informed of the charge against him and of his legal rights.

Defendant gives true name as charged and enters his plea of not guilty of the offense charged.

Defendant with counsel in open court each personally demands jury trial.

Jury trial set for May 12, 1941 at 9:30 A. M. in Div. 7.

Bail fixed in the sum of $500/00. Bail up to stand.

Mar 12, 1941

Cause called. Judge Dawson presiding. Both parties ready. People represented by R. Ringwald (D. C. A.). Defendant represented by Baldo M. Kristovich.

Trial by jury waived by consent of plaintiff, and of defendant personally and his counsel, in open court.

Witness sworn and examined for the People: Wm. C. Haile.

Motion of defendant to dismiss—denied.

No witnesses sworn and examined for the defendant.

Exhibits filed: People's "A"—2 Pieces Yellow Paper.

Both sides rest.

Defendant adjudged guilty of the offense charged.

Defendant makes oral application for probation.

Continued to May 19, 1941 at 2 P. M. for hearing on probation and sentence in Div. 7.

Defendant committee. BAIL ORDERED EXONERATED.

May 19, 1941 — Cause called. Judge Dawson presiding. Both parties ready. People represented by R. Ringwald (D. C. A.). Defendant in court and represented by Morris Levine.

Affidavit filed.

Written motion for a new trial filed.

Defendant objects to Court sentencing defendant, because Court lacks jurisdiction.

Motion of defendant for a new trial denied.

Probation report filed. Probation denied.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court this May 19, 1941 that for said offense of VAGRANCY—LEWD the said JOHN C. GEIGER be imprisoned in the City Jail of Los Angeles City for the term of 6 months and the said defendant be discharged at the expiration of said term.

Defendant committed.

May 19, 1941 — Written Notice of Appeal filed.
Bail on Appeal set at $500.

May 19, 1941 — $500-Surety Bond on Appeal filed.

May 24, 1941 — Appellant's proposed Statement on Appeal filed.

May 26, 1941	Affidavit of Service by mail filed.
May 28, 1941	Respondent's proposed amendments to Appeallant's proposed Statement on Appeal and affidavit of service by mail filed.
May 28, 1941	Settlement of Statement on Appeal set for Jun. 5, 1941 at 2 P. M. in Div. 7.
Jun. 5, 1941	Respondent's proposed amendments to Appellant's proposed Statement on Appeal allowed.
	Respondent to prepare engrossed Statement on Appeal.
Jun. 10, 1941	Engrossed Statement on Appeal settled, allowed, certified and filed.

I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

June 11, 1941

(Seal) URBAN F. EMME,

Clerk of Municipal Court, City of Los Angeles County of Los Angeles, State of California

By Katherine Christensen,
Deputy.

(Endorsed) No. 5132, Div 30 In the Municipal Court, City of Los Angeles County of Los Angeles, State of California The People of the State of California Plaintiff vs. John C. Geiger Defendant. Transcript of Docket Cr A 1806 Filed Jun 11, 1941 L. E. Lampton, County Clerk, By E. L. Pierce, Deputy.

State of California, County of Los Angeles—ss.

No. Cr. A. 1806

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the certified copy of the Transcript of Docket on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 28 day of October, 1941.

(Seal)

L. E. LAMPTON,
County Clerk,
By J. B. Williams,
Deputy.

In forma pauperis
Petition not printed

314 U.S. 685, 715

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Supreme Court of the United States

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39

October Term, 1941

No. 683

JOHN C. GEIGER,

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

RAY L. CHESEBRO,
City Attorney,
W. JOS. MCFARLAND,
Assistant City Attorney,
JOHN L. BLAND,
Deputy City Attorney,
City Hall, Los Angeles, California,
Counsel for Respondent.

Parker & Baird Company, Law Printers, Los Angeles.

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RESPONDENT'S BRIEF.

Introduction.

This proceeding is an application for certiorari addressed to the Superior Court of the State of California, in and for the County of Los Angeles, asking this Court to review the action of such Court in the matter of the application of John C. Geiger for a writ of habeas corpus.

The petitioner in this proceeding is the same person as is the petitioner in the matter of *John C. Geiger v. The People of the State of California*, Docket No. 657, in this Court.

The case having Docket No. 657 grows out of the action of the Appellate Department of the Superior Court upon an appeal to such Appellate Department from judg-

ment of conviction in the Municipal Court of the City of Los Angeles.

The instant proceeding grows out of the action of Department 22 of the Superior Court (not the Appellate Department of such Court) upon the original petition of John C. Geiger for a writ of habeas corpus.

The proceedings are entirely separate actions involving different questions in procedure and jurisdiction, yet arise from the same set of circumstances.

The petitioner raises but two grounds in his petition: (1) that he was denied right to counsel, and (2) invalidity of the section of the Penal Code with violation of which he was charged. He mentions that the public defender did not waive jury after his appointment, but apparently does not urge that fact in opposition to the judgment of the Superior Court. The matter of waiving jury being primarily one of state concern, and because the question of compliance with the state law does not present a federal question, at least not upon the record here, we shall assume that petitioner does not claim prejudice by reason of such failure on the part of the public defender. We shall not discuss such point other than to direct attention to the opinion and order of the Superior Court in the record immediately preceding the transcript of testimony.

The Superior Court is a court of general jurisdiction (State Constitution Art. VI, Sec. 5) while the Appellate Department of the Superior Court is a statutory court, a department created by the Legislature (Stats. 1929, p. 836) by adding to the Code of Civil Procedure two new sections numbered 77a and 77b, which are set out in appendix hereto, page 17.

The Appellate Department of the Superior Court is the court of final jurisdiction for appeals from inferior courts. Appeals may be taken directly to the United States Supreme Court from its decisions. The judges who constitute the personnel of such Appellate Department are also judges of the Superior Court, and when sitting as judges of such court and not as judges of the Appellate Department they have the same jurisdiction as do other judges of the Superior Court. The judges of the Appellate Department frequently do sit as judges of the Superior Court in original proceedings instituted in such court and, while so doing, are designated as Department 22 of such court.

We shall hereafter, in our argument, point out why it is that in a habeas corpus proceeding the order of a judge of the Superior Court does not constitute a decision by the court of last resort of the state.

Statement of Fact.

The record in this case is unpaged, and for that reason we find it difficult to insert citations to line and page of the record but shall do so to the best of our ability.

The petitioner was charged in the Municipal Court of the City of Los Angeles with violation of Section 647 of the Penal Code of the State of California in a complaint filed April 15th, 1941. He was arraigned on April 15th and the case was set for trial on May 12th, 1941. On that date petitioner stated he was ready to go to trial without counsel, and waived jury trial [Rep. Tr. p. 2, lines 9-20].

Thereafter a deputy public defender was ordered to assist him [Rep. Tr. p. 2, lines 20-25].

The first paper in the record, following the petition to this Court, is a copy of the petition for writ of habeas corpus filed in the Superior Court. Such writ has at the heading thereof the following legend: "No. CR A 1806." Such number is the number of the proceeding in the Appellate Department of an appeal from judgment in the Municipal Court. Examination of the record, and in particular the return to writ (immediately following such petition) and the clerk's endorsement on such return, together with the minutes of Department 22 of the Superior Court for July 11, 1941, and July 29, 1941, discloses that the number of the habeas corpus action in the Superior Court is H. C. 11585.

In paragraph (b) of the second page of the petition for writ of habeas corpus, the petitioner alleged he was charged with "lewd and lascivious conduct." Such statement is in error. The copy of complaint in Docket No. 657, to which petitioner has made reference, shows the actual charge to be the offense of being a lewd and dissolute person. The difference lies in the fact that petitioner's statement indicates that he was charged with "doing" certain acts, while in fact he was charged with being a person of a particular character, defined by our statutes as a vagrant (Penal Code, Sec. 647).

Testimony concerning the proceedings in the Municipal Court was taken at the hearing upon the writ, and we shall refer to such testimony hereafter.

ARGUMENT.

Summary of Argument.

(1) Petitioner has not exhausted his remedy in the courts of the State of California.

(2) Defendant was not denied the right to counsel.

(3) Section 647 of the Penal Code is not unconstitutional.

I.

The Petitioner Has Not Exhausted His Remedy in the Courts of the State of California.

As shown by the record, and as more particularly pointed out in our introductory statement, the proceeding in the state court, out of which the instant proceeding grew, was a petition for a writ of habeas corpus and the hearing thereon.

Section 1474 of the Penal Code of the State of California provides that application for the writ of habeas corpus shall be made by petition. That Code provides that "the writ of Habeas Corpus may be granted in the manner provided by the Constitution" (Penal Code, Sec. 1475). The Constitution provides that the Supreme Court, and each justice thereof, has power to issue writs of habeas corpus (California Constitution, Art. VI, Sec. 4) and like power is conferred upon the District Courts of Appeal and the justices thereof (California Constitution, Art VI, Sec. 4b). The Superior Court is given power to issue such writs by the provisions of Section 5 of Article

VI of the State Constitution. It is thus seen that writs of habeas corpus may be issued out of each of the courts named as an original proceeding in such court.

Under the provisions of Section 1475, Penal Code, pertinent provisions of which are printed in appendix hereto, page 18, if a writ is denied in one court a new application therefor may be made in the court of next higher jurisdiction. The practice in this state is for petitioners to file successive writs in the Superior Court, District Court of Appeal and the Supreme Court. (*Matter of Zany*, 164 Cal. 724.)

It follows that, upon the denial by the Superior Court of his release upon habeas corpus, petitioner could have, and under the law and practice in the state should have, made application to a higher court if dissatisfied with the decision of the Superior Court.

State courts, equally with federal courts, are under obligation to guard and enforce the rights protected by the Federal Constitution, and the Supreme Court of the United States will not entertain a petition for writ of habeas corpus unless it appears that the remedies in the state courts have been exhausted. (*Mooney v. Holohan*, 294 U. S. 103.)

The petition should be denied for the reason that petitioner has not exhausted his remedies in the courts of the State of California.

II.

The Petitioner Was Not Denied the Right of Counsel.

The petitioner was charged in the complaint filed April 15th, 1941, in the Municipal Court of the City of Los Angeles, with having violated Section 647 of the Penal Code of the State of California. He had been arrested and released on bail on April 14th. The foregoing facts appear from the record in Docket No. 657, and in particular in the copy of the docket of the Municipal Court filed in the Appellate Department of the Superior Court as part of the record on appeal. A copy of such docket was omitted from the record submitted by petitioner under Docket No. 657, and is supplied by us in connection with our brief in that proceeding. On April 15th he was arraigned and his trial set for May 12th [Rep. Tr. p. 40, lines 7-11.] On May 12th defendant, in open court, stated he was ready to proceed without counsel and waived trial by jury. Thereafter a deputy public defender was appointed to assist him [Rep. Tr. p. 2, lines 15-25]. Petitioner testified that at no time had he secured private counsel [Rep. Tr. p. 40, line 17, to p. 41, line 9].

At the time of the hearing upon the petition, out of which the instant proceeding grew, testimony was taken, a certified copy of which is made a part of the record of this Court. From such testimony the trial court made the following findings of fact:

> "From the evidence produced at the hearing on the writ, the following facts, among others, are established: that petitioner appeared in court on the date set for trial, having been duly arraigned nearly a month previously. He did not have an attorney but stated he was ready for trial. In response to an inquiry from the court as to whether he desired a jury

trial or a trial by the court, defendant stated he desired a court trial. After some other matters were disposed of the defendant's case was called for trial. He came forward to the counsel table and the first witness was sworn. Then before any testimony had been given, the trial judge told Deputy City Public Defender Kristovich, who was regularly assigned to that court, to assist defendant in his case. Deputy Kristovich took his place at the counsel table and the taking of evidence then got under way. The People presented two witnesses who were cross-examined by Deputy Kristovich. Officer Brown overheard defendant say to Deputy Kristovich that the testimony of the first witness—Officer Haile—was correct, or words to that general effect. Counsel for defendant made a motion to dismiss at the close of the People's case. This was denied. Officer Brown then overheard Deputy Kristovich ask the defendant if he wanted to take the stand and he said 'No.' The two police officers and the defendant were the only witnesses to the conduct on which the charge was based. The defendant rested and the court found him guilty. Petitioner appears to be a young man of good education and to have had considerable experience, having been in the navy prior to this difficulty, and prior to that he had a clerical position with the sheriff's office of this county." [Opinion and Order, p. 1, line 10, to p. 2, line 13,]

The above findings are supported by the testimony of the petitioner that he was in the navy with rating of yeoman [Rep. Tr. p. 32, lines 13-19] and that prior to that he was a clerk in the sheriff's office in Los Angeles County [Rep. Tr. p. 34, lines 1-4]. Petitioner testified that upon the call of the case he told the court he wished

a "court trial" [Rep. Tr. p. 29, lines 2-5] and that thereafter an attorney, a deputy public defender, was appointed to act as his counsel [Rep. Tr. p. 29, lines 7-12].

The record further shows that after two witnesses for the People had testified, counsel consulted with his client [Rep. Tr. p. 3, lines 5-13]. After the People rested, the petitioner's counsel asked him if he had any witnesses he wished to call and he answered in the negative. [Rep. Tr. p. 46, lines 1-5], and his counsel asked him if he wished to testify and he stated that he did not [Rep. Tr. p. 46, lines 16-22], and the petitioner told his attorney that the testimony of the People's witness, Officer Hale, was all right or correct [Rep. Tr. p. 46, lines 6-10]. Petitioner was arraigned on April 15th and was not brought to trial until May 12th [Rep. Tr. p. 40, lines 7-12] during which time he was at liberty on bail.

Petitioner's counsel satisfied himself from examination of the officers that the only possible witnesses to the acts giving rise to the charge were the two police officers and the defendant [Rep. Tr. p. 25, lines 7-18].

The evidence in the transcript in this case and the opinion of the Superior Court support the conclusion that the petitioner, who is a young man, educated, and, in some measure at least, experienced in the matter of administration of law, knew the nature of the charge, and his right to counsel. He had ample opportunity to secure counsel of his own choosing but elected to represent himself. Certainly when the trial judge selected counsel for him he was not prejudiced thereby.

We are familiar with the ruling of this Court in the case of *Powell v. Alabama*, 287 U. S. 45, and in other cases, to the effect that under certain circumstances denial

of continuance of a trial in order to afford newly appointed counsel time to prepare a case may amount to denial of the right to counsel. We would not urge that the right to counsel is any less sacred in misdemeanor cases than in capital or felony cases, but manifestly the question in each instance is whether as the result of proceeding in the trial court the defendant has suffered injury.

The mere fact that continuance for the purpose of enabling counsel to prepare for trial was refused does not constitute denial of counsel, and if from the record it appears that defendant was ably and intelligently represented, lack of intervening time between appointment of counsel and trial will not constitute deprivation of constitutional rights. (*Avery v. State of Alabama*, 308 U. S. 444.)

The determination of whether there has been an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused (*Johnson v. Zerbst*, 304 U. S. 458, 464) and the burden of proof (in habeas corpus) rests upon petitioner to establish that he did not competently and intelligently waive the right to counsel. (*Johnson v. Zerbst, supra*, p. 469.)

Proof of appointment of a deputy public defender to assist a defendant having the knowledge and experience possessed by the petitioner who was ready and willing to proceed to trial without counsel upon a misdemeanor, together with proof of proceeding to trial without continuing the trial to permit newly appointed counsel time in which to consult with his client or investigate the circum-

stances of the offense, falls far short of carrying the burden of proof of denial of constitutional rights. Especially is this so when the counsel appointed is a deputy public defender experienced in the trial of misdemeanor cases and who, at that time, was engaged solely in the task of defending persons charged with misdemeanor criminal offenses.

III.

Section 647 of the Penal Code of the State of California Is Not Unconstitutional.

The record in this case does not contain a copy of the complaint in the Municipal Court. A copy of such complaint, certified by the clerk of the Municipal Court, is in the record in Docket No. 657.

The defendant was charged with having violated the provisions of Section 647 of the Penal Code of the State of California, which, in so far as pertinent here, reads as follows:

> "(5) Every idle, or lewd, or dissolute person, or associate of known thieves; . . . is a vagrant and is punishable by a fine of not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

For the purpose of this argument we may disregard the words "idle" and the phrase "associate of known thieves" as petitioner was charged only with being a "lewd and dissolute person."

The requirement of certainty in statutes does not preclude the use of ordinary terms to express ideas which

find adequate interpretation in common use and understanding. (*Sproles v. Binford*, 286 U. S. 374, 393.)

We agree with petitioner that when used in a statute without specific definition, words are to be given the meaning commonly accepted by ordinary persons. The fact that during ages past they may have had a meaning entirely different from that associated with their use at the present time, does not render their meaning uncertain if at the present time they have in the public mind a fixed meaning.

Webster's Unabridged Dictionary lists four definitions of the word "lewd," three of which are shown to be obsolete. The only definition given by such dictionary not listed as obsolete is as follows:

> "Lustful, libidinous, lascivious, unchaste, lewd in speech and behavior."

The word "lewd" has been judicially defined by various courts in:

Dysart v. United States (C. C. A.), 4 Fed. (2d) 765, 766;

McKinley v. State (Okla.), 244 Pac. 208;

State v. Rose, 147 La. 243, 84 Sou. 643;

Jamison v. State, 117 Tenn. 58, 94 S. W. 675.

Without quoting at length from the cases, suffice it to say that the cases seem to be in substantial agreement that the word "lewd" when used in a statute means acts tending to suggest or arouse sexual desires; offensive to common sense of decency and modesty of the community. The word is used in the Federal Statutes and in *United States v. Bebout* (U. S. D. C., Ohio), 28 Fed. 522, the court

held that when so used means "given to unlawful indulgence of lust; eager for sexual indulgence." See also definition in *United States v. Clarke* (U. S. D. C., Mo.), 38 Fed. 732, 734.

The word "lewd" imports in the mind of the ordinary person at this time the meaning of a desire to indulge in unnatural sex acts or exhibitions, and the fact that long since it may have meant an ignorant, unlearned, lay or non-clerical person does not render it uncertain when used in a statute.

Likewise, the word "dissolute" has a well defined meaning in the public mind at the present time, and is expressed in the following definition in Webster's Unabridged Dictionary:

> "Loosed from restraint; unrestrained; lawless; esp., loose in morals and conduct, wanton; lewd; debauched."

This word, like the word "lewd" had at one time various other meanings which current dictionaries show to be now obsolete.

The word "dissolute" has also been judicially defined.

State v. Harlowe, 174 Wash. 227, 24 Pac. (2d) 601;

People v. Scott, 113 Cal. App. (Supp.) 678, 296 Pac. 601.

It may be assumed that, whatever may be the obsolete definitions found in the dictionaries, our courts will, in interpreting the statutes follow the judicial definitions,

which agree in all respects with definitions given by the dictionaries as the presently accepted meaning of the word.

It is manifest that, so long as human ingenuity evolves new and revolting ways of engaging in lustful actions it will be impossible for the Legislature to catalogue the acts which amount to lewdness.

Assuming for the sake of argument that the word "lewd" should be considered as having those meanings considered by lexicographers as obsolete, petitioner is in no better position.

If the evidence shows that the defendant performed an act within the police power to prohibit, and included within the terms of the statute, he may not complain because as to some other person who committed other acts the statute is too broad in its scope. (*Smiley v. Kansas*, 196 U. S. 447, 467.) If petitioner's complaint be that one wishing to do a certain act cannot tell in advance whether a jury or court would consider it lewd, or dissolute, we point out that a statute is not unconstitutional as being uncertain merely because a person's fate may depend upon his placing an estimate upon his actions which corresponds with that which some jury may place upon such actions at some future time.

Nash v. United States, 229 U. S. 373, 377;
Miller v. Strokl, 239 U. S. 426, 434;
Fox v. Washington, 236 U. S. 273, 277.

The statute meets the requirements of certainty prescribed by the Constitution.

Conclusion.

Because of the fact that the petitioner has not exhausted his remedies in the court of the State of California, his petition for certiorari should be denied without further consideration of the points urged by him.

If, however, it be deemed proper that some attention be given to his plea, it becomes readily apparent that both grounds urged by him are without merit and certiorari should be denied.

Respectfully submitted,

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APPENDIX.

CODE OF CIVIL PROCEDURE:

"Sec. 77a. *Appellate departments of the Superior Courts: Designation of judges.* In the Superior Court of every county or city and county wherein any municipal court is established, there shall be a department thereof to be known and designated as 'Appellate department of the Superior Court,' and which shall consist of three judges of such Superior Court, who shall be designated by the chairman of the judicial council, and who, in addition to their other duties, shall serve as such for the period specified in the order of designation, and one of whom shall be designated by the chairman of the judicial council as presiding judge thereof."

CODE OF CIVIL PROCEDURE:

"Sec. 77b. *Same: Powers, duties and jurisdiction; Rules by Judicial council.* The appellate department provided by the preceding section shall have appellate jurisdiction on appeal from municipal, justices' and other inferior courts established within the county or city and county wherein such appellate department is established, in all cases in which an appeal may be taken to the Superior Court, as is now or may hereafter be provided by law, except on such appeals as require a retrial in the Superior Court. The powers of such appellate department shall be the same as are now or may hereafter be provided by law relating to appeals to the Superior Courts. The presence of two judges of such department shall be necessary to transact any business, except such as may be done at chambers, and the concurrence of two judges shall be necessary to pronounce a judgment. The pre-

siding judge of such appellate department may convene the court at any time and shall supervise the business of the department. Rules governing practice and procedure and the disposition of the business of such department shall be made by the judicial council."

PENAL CODE:

"Sec. 1475. *How granted: Proceedings thereon: Application must be verified: Prior applications: Proof of service required before hearing.* The writ of habeas corpus may be granted in the manner provided by the Constitution. If the writ has been granted by any court or a judge or justice thereof, and after the hearing thereof the prisoner has been remanded, he shall not be discharged from custody by the same or any other court of like general jurisdiction, or by a judge or justice of the same or any other court of like general jurisdiction, unless upon some grounds not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a Superior Court or a judge thereof, no writ can be issued upon a second or other application except by the appropriate District Court of Appeal or some justice thereof, or by the Supreme Court or some judge thereof, and in such an event such writ must not be made returnable before any Superior Court or any judge thereof. In the event, however, that the prior writ was returned or made returnable before a District Court of Appeal or any justice thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof. * * *"